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## THE FEE-SHIFTING REMEDY: PANACEA OR PLACEBO?

HAROLD J. KRENT\*

Attorney fee shifting rarely grabs the public imagination. Occasionally, an astronomic fee award warrants a newspaper headline,<sup>1</sup> but the question of which litigant should bear attorney fees is relegated otherwise to the footnotes of public discourse on legal topics. Few in this country, I suspect, have any idea about when statutes or the common law authorize shifting fees from one party to the other. The public is perhaps most concerned, and perhaps rightly so, that the fees not be shifted to itself.

The attention generated by former President Bush's Council on Competitiveness and Speaker Gingrich's Contract with America has, however, piqued the public's interest in this arcane topic. Fee shifting has become an integral part of legal reform generally. Indeed, the traditional American rule of attorney fees, under which each litigant bears its own fees, has been challenged under two quite different premises.

Consistent with the principles underlying the Council on Competitiveness and the Contract with America, many critics have blamed the American rule for fomenting excessive litigation: parties sue so often in part because they have too little to lose. Under a fee-shifting regime, plaintiffs may think twice about filing suit for fear of paying their adversaries' fees. The Council on Competitiveness under President Bush recommended two-way fee-shifting schemes in litigation involving the United States,<sup>2</sup> and President Bush implemented that suggestion in Executive Order 12,778, directing that agencies consider two-way fee-shifting schemes with contractual partners.<sup>3</sup> The 104th

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1. Richard B. Schmitt, *Court Overturns Attorneys' Fee in Whistle-Blower Case*, WALL ST. J., Dec. 1, 1994, at B2 (describing a \$5.4 million dollar fee award that was overturned); Stuart Taylor, Jr., *Texas Prison Case Lawyers to Get \$1.71 Million in Fees*, N.Y. TIMES, Nov. 20, 1982, at 10 (describing the largest fee award for attorneys who litigate prison conditions). Indeed, fee shifting recently made it to prime-time television. See *The Trouble with Lawyers* (ABC television broadcast, January 2, 1996).

2. PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 24-25 (1991).

3. 3 C.F.R. 359, 362 (1992), reprinted in 28 U.S.C. § 519 (1993) (Section 1(h) of the Executive Order stated in pertinent part that "in any civil litigation initiated by the United States, litigation counsel shall offer to enter into a two-way fee shifting agreement with opposing parties to the dispute, whereby the losing party would pay the prevailing party's fees and costs, subject

Congress, under Speaker Gingrich's prodding, has proposed legislation to enact a two-way fee-shifting or loser-pays mechanism in diversity actions under the Common Sense Legal Reforms Act of 1995,<sup>4</sup> in securities litigation,<sup>5</sup> and in all civil proceedings not covered by specific legislation.<sup>6</sup> A loser-pays system might benefit the public by reducing the amount of litigation across the board.

In contrast, others have long viewed the American rule as an impediment to private civil law enforcement and have therefore urged enactment of one-way fee-shifting statutes in selective contexts. Plaintiffs should be encouraged to sue when litigation benefits the public as a whole.<sup>7</sup> Accordingly, over one hundred and eighty statutes at the federal level,<sup>8</sup> and countless more within states,<sup>9</sup> direct that a prevailing plaintiff can recover attorney fees. Several bills have been proposed within the 104th Congress in an attempt to continue this trend. For instance, the Second Amendment Reaffirmation Act of 1995<sup>10</sup> would have provided attorney fees for prevailing plaintiffs who rebuff governmental efforts to assess excise taxes on certain firearms, and the Medical Records Confidentiality Act of 1995<sup>11</sup> would have allowed plaintiffs who successfully challenge breaches of confidentiality to recover their fees. Similarly, the Private Property Protection Act of 1995<sup>12</sup> would have authorized property owners who successfully challenge certain government regulation to recover their fees, and Senate Bill No. 554, as part of regulatory reform, would have expanded the right of individuals and businesses litigating civil actions

to reasonable terms and limitations."). President Clinton subsequently rescinded this section. Exec. Order No. 12,988, 61 Fed. Reg. 4,729 (1996).

4. H.R. 10, 104th Cong., 1st Sess. § 101 (1995). This bill in turn has influenced drafting of subsequent bills. See, e.g., Common Sense Product Liability and Legal Reform Act of 1995, H.R. 1075, 104th Cong. § 302 (1995).

5. H.R. 1058, 104th Cong., 1st Sess. § 3 (1995). The loser-pays provision was excised from the version of the bill that was ultimately enacted. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67 (codified as 15 U.S.C. §§ 77z-1, 78u-4 (West Supp. 1996)). See also Consumer Choice Health Reform Act of 1995, H.R. 1424, 104th Cong., 1st Sess. (1995) (providing for two-way fee shifting for certain antitrust claims).

6. H.R. 64, 104th Cong., 1st Sess. (1995); see also *infra* note 33.

7. Moreover, from the perspective of compensation, many have argued that one-way fee shifting is superior because it assures the plaintiff full redress for any wrongs inflicted. See *infra* text accompanying note 19.

8. See generally Awards of Attorneys' Fees by Federal Courts and Federal Agencies (Congressional Research Service, Nov. 28, 1994) (reporting 180 one-way fee-shifting statutes against the federal government alone).

9. See Susan M. Olson, *How Much Access to Justice From State "Equal Access to Justice Acts"?*, 71 CHI.-KENT L. REV. 547, 552-53 (1995) (reporting that a large majority of the almost 4000 state fee-shifting statutes shift fees to prevailing plaintiffs only).

10. H.R. 2393, 104th Cong., 1st Sess. § 3 (1995).

11. S. 1360, 104th Cong., 1st Sess. § 302 (1995).

12. H.R. 9, 104th Cong., 1st Sess. (1995).

against the United States to recover fees and costs under the Equal Access to Justice Act.<sup>13</sup>

These two departures from the American rule—loser-pays and one-way fee-shifting mechanisms—conflict. As Professor Susan Olson's paper reminds us, the very pro-litigation purpose of one-way fee-shifting devices runs afoul of the premise underlying current interest in two-way fee shifting.<sup>14</sup> Not surprisingly, representatives in the 104th Congress proposed legislation to curtail or eliminate one-way fee shifting in particular contexts because of excessive litigation. For example, the Stop Turning Out Prisoners Act would have eliminated fee eligibility for certain plaintiffs challenging prison conditions,<sup>15</sup> and the Judicial Immunity Restoration Act would have eliminated fees in a number of civil rights actions against judicial officials.<sup>16</sup>

This renewed legislative interest highlights the need for continued analysis of fee shifting within the legal academy. Fine articles exist, particularly those that have modeled fee-shifting regimes in an effort to gauge their likely impact on litigation and settlement.<sup>17</sup> But most of the models largely have been based on idealized economic assumptions, slighting complications such as asymmetrical information, reputational interests, and the like. Moreover, little empirical work has been done to determine whether the models in fact work, with some notable exceptions.<sup>18</sup> Overlooked, as well, has been the impact of fee-shifting rules on shaping the substantive doctrine of the underlying conflicts; the availability of or exposure to fees ineluctably exerts pressure on doctrines of liability. Finally, in addition to these instrumental concerns, few have addressed the question of fee shifting from a more normative angle. From a perspective of corrective justice, for instance, when should a party injured by the tortious conduct of an-

13. Equal Access to Justice Reform Amendments of 1995, S. 554, 104th Cong., 1st Sess. (1995); see also H.R. 2235, 104th Cong., 1st Sess. § 2 (1995) (compensating certain patent owners who successfully prosecute an infringement suit).

14. Olson, *supra* note 9, at 547-48.

15. H.R. 554, 104th Cong., 1st Sess. (1995).

16. S. 1115, 104th Cong., 1st Sess. (1995).

17. For a representative sampling, see Symposium, *Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 1 (Winter 1984).

18. See, e.g., Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 744-47 (1988) (examining influence of fee-shifting statute on incidence of civil rights action filings); Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345 (1990) (providing empirical analysis of Florida's fee-shifting rule for litigation involving medical malpractice).

other recover attorney fees,<sup>19</sup> or when should a party injured by an unmeritorious lawsuit recover its costs?

The contributors to this Symposium add measurably to what we know about fee-shifting regimes. From a theoretical perspective, three contributors have entered the debate as to which fee-shifting regime promotes the most litigation, and which best facilitates settlement. More specifically, the articles of Professors Hylton, Talley, and Hay focus on fee shifting's impact on economic incentives.

Keith Hylton argues cogently that the allocation of litigation costs affects the substance of lawsuits, and in particular, he analyzes the impact of fee-shifting rules on the *predictability* of law.<sup>20</sup> He breaks down predictability into two components: static predictability, which concerns the ability of individuals to understand the rules that govern their private arrangements, including litigation; and dynamic predictability, which concerns whether individuals can accurately predict rules in the future.<sup>21</sup> Greater predictability can in turn affect parties' compliance with underlying legal norms and the incentives of injured parties to sue.

With respect to dynamic predictability, Hylton suggests that the no fee-shifting (or American) rule may be preferable given the comparative ability of claimants to raise novel claims. Novel claims allow the law to change with evolving technology and social conditions, ultimately ensuring predictability.<sup>22</sup> Plaintiffs are unlikely to raise as many novel claims under a two-way fee-shifting scheme given the greater penalty—defendants' attorney fees—should they lose.<sup>23</sup> The question of static predictability is closer. Hylton argues that, although two-way fee shifting enhances the prospect for compliance with the law by increasing defendants' exposure to fees (in comparison to the American rule), this extra incentive for compliance will be dampened by the relative unwillingness of plaintiffs to bring suit except when they are optimistic of victory—because of their increased exposure to fees.<sup>24</sup> Moreover, the disincentive to settlement under a two-way fee-shifting scheme may further undermine static predictability by providing more occasions for judicial holdings that cannot be reconciled with

19. If a prevailing party can recover for her physician bills, why not for her attorney fees as well, since both represent out-of-pocket expenses?

20. Keith N. Hylton, *Fee Shifting and Predictability of Law*, 71 CHI.-KENT L. REV. 427 (1995).

21. *Id.* at 429-34.

22. *Id.* at 445-46.

23. *Id.* at 445-49.

24. *Id.* at 441-43.

existing law.<sup>25</sup> On balance, therefore, there may be slightly greater predictability overall under the American system, contrary to what has previously been thought.<sup>26</sup> In a concluding section, Hylton notes that one-way fee shifting should bring even greater predictability than the American rule in light of the increased incentive to file strong as well as novel claims.<sup>27</sup>

Greater predictability under the American system may also play an important role in shaping the doctrine of negligence or other substantive doctrines. Given the American rule's hospitality to novel claims, for example, new technologies should be incorporated more quickly into negligence claims in this country. Some empirical evidence bears out this result.<sup>28</sup> Similarly, the comparative underdevelopment of British corporate law may stem in part from the role of two-way fee shifting in deterring low-probability, ambiguous evidence claims—as underlie many derivative actions in this country—from being heard.<sup>29</sup> Based on Hylton's analysis, therefore, we should be chary of introducing a loser-pays system in contexts in which legal evolution is normatively attractive.

Eric Talley's contribution focuses more exclusively upon the impact of informational asymmetries on fee shifting and settlement.<sup>30</sup> He argues that one key to understanding the likelihood of settlement turns on the private information each side possesses, whether as to liability or damages. As he has done with his earlier analysis of liquidated damages,<sup>31</sup> Talley uses a game-theoretic approach popularly termed "mechanism design," which attempts to reproduce the set of outcomes consistent with noncooperative bargaining, rather than committing to any particular bargaining procedure. Through bargaining, parties can create mutual economic gains via agreement, and thereby avoid costly litigation.<sup>32</sup> In contexts of informational asymmetry, which are likely commonplace in litigation, settlement is far more likely when the parties cannot exploit private information through strategic misrepresentation. When parties have private information about the probability of liability, their incentive to misrepresent-

25. *Id.* at 446-47.

26. *Id.* at 445-49.

27. *Id.* at 452-56.

28. *Id.* at 449-51.

29. *Id.* at 450-51.

30. Eric Talley, *Liability-Based Fee-Shifting Rules and Settlement Mechanisms Under Incomplete Information*, 71 CHI.-KENT L. REV. 461 (1995).

31. Eric L. Talley, Note, *Contract Renegotiation, Mechanism Design, and the Liquidated Damages Rule*, 46 STAN. L. REV. 1195 (1994).

32. Talley, *supra* note 30, at 469-72.

sent value will be strongest where fee shifting is directly linked to success at trial, as under the English rule.<sup>33</sup> For instance, defendants with the greatest likelihood of liability have the most incentive to misrepresent strategically their positions, and conversely, defendants with less likelihood of exposure have diminished incentive to exploit any private information. By magnifying the difference between the strongest and weakest cases, the two-way fee-shifting system accordingly increases the defendant's incentive to bargain insincerely.<sup>34</sup> In short, the more that a fee structure complements the parties' other strategic incentives during negotiation, the less likely that the mechanism will promote settlement.<sup>35</sup>

Talley therefore agrees with Hylton that the American rule, and to a lesser extent one-way pro-plaintiff fee shifting, would facilitate settlement more than the current loser-pays proposals.<sup>36</sup> His mechanism design approach corroborates others' intuitions that the English rule, while discouraging litigation by plaintiffs who are uncertain as to their chance of success, also dampens the likelihood of settling those cases that are filed. Talley then concludes with the counterintuitive observation that the prospect for settlement is in fact greatest in a system in which *the winner* would pay the loser's attorney's fees.<sup>37</sup> The winner-pays rule minimizes a party's incentive to overstate the strength of its case. Of course, Talley does not endorse such a scheme in light of, among other problems, the incentive it would give individuals to file frivolous suits, but merely stresses that the prospect of settlement is greater under such a system even than under the American rule. Yet Talley's perspective does suggest that fee shifting—as well as offer of settlement provisions—can be structured to minimize the potential that litigant misrepresentation will impede amicable resolution of litigation.

Bruce Hay addresses how to maximize deterrence of wrongdoing through one-way fee shifting.<sup>38</sup> Hay models his theory on Gary Becker's prior work on optimal deterrence.<sup>39</sup> In short, Becker has argued that the optimal enforcement scheme combines low enforcement costs with relatively large penalties to ensure the most deterrence of

33. *Id.* at 469-72.

34. *Id.* at 484-87.

35. *Id.* at 484.

36. *Id.* at 484-85.

37. *Id.* at 485-86.

38. Bruce L. Hay, *Fee Awards and Optimal Deterrence*, 71 CHI.-KENT L. REV. 505 (1995).

39. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

wrongdoing at the least social cost. Applied to the fee context, the goal is to raise the stakes of wrongdoing for the defendant by shifting fees to prevailing plaintiffs, without encouraging too much investment by plaintiff's counsel into bringing suit.<sup>40</sup> The amount of the fees need not be linked to the fees actually incurred by the plaintiff—there is nothing necessarily inefficient about plaintiff's counsel receiving windfalls as long as such recoveries do not spark overinvestment in litigation.<sup>41</sup> From his perspective, fee shifting is akin to an award of punitive damages.

The practical difficulty of preventing excessive attorney investment, however, undermines the utility of fee awards in attaining optimal deterrence. When the prospect of fee shifting (or punitive damages) exists, attorneys will invest more in the litigation.<sup>42</sup> To be sure, one can imagine certain legal assistance clinics for whom the prospect of greater fee recovery would not induce excessive effort. Or, if the fee award is payable to the state, then plaintiff counsel's investment effort should not increase materially. But, irrespective of the implementation problems, Hay's insight suggests that fee shifting might be normatively attractive as a matter of deterrence irrespective of the resources of the parties, the size of the claim, or the likely impact of the litigation on the public.

In addition to theoretic modelling, the contributors have also added to our empirical understanding of fee-shifting schemes. Professors David Anderson and Thomas Rowe present information generated from experiments designed to determine the impact of offers of settlement on the rate and level of settlement.<sup>43</sup> Currently, Rule 68 of the Federal Rules of Civil Procedure provides that:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party . . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.<sup>44</sup>

Rule 68 applies primarily to costs incurred by both sides, such as witness fees and transcripts, but it does not usually cover attorney fees. An offer of judgment device could, however, include attorney fees as

40. Hay, *supra* note 38, at 507.

41. *Id.* at 515.

42. *Id.* at 511-13.

43. David A. Anderson & Thomas D. Rowe, Jr., *Empirical Evidence on Settlement Devices: Does Rule 68 Encourage Settlement?*, 71 CHI.-KENT L. REV. 519 (1995).

44. FED. R. CIV. P. 68.



well as costs,<sup>45</sup> and Anderson and Rowe designed simulated bargaining exercises to test various offer of judgment provisions that include fees. They tested both the conventional offer of judgment rule, as well as a variant termed the Sincerity Rule, under which, if an offer of judgment is not accepted, the *offeror* would pay the offeree's reasonable post-offer fees (whatever the outcome of trial), rather than the other way around as with conventional offer rules. The purpose of the Sincerity Rule would be to promote offers of judgment close to the expected judgment level, and thus facilitate settlement.<sup>46</sup>

Theoretical work on offers of judgment has concluded that such devices are unlikely to alter the rate of settlement.<sup>47</sup> Disagreement over the probable jury award or over how to divvy the joint savings from avoiding trial is likely to remain even when the offer of judgment mechanism is used. The results from Anderson's and Rowe's simulations, however, were intriguing. They report that the conventional offers of judgment did have a modest positive impact upon settlement, softening the bargaining positions of both plaintiffs and defendants.<sup>48</sup> Results under the Sincerity Rule confirmed to some extent their hypothesis that such an unconventional offer of judgment device would facilitate settlement as long as either party is willing to offer the adverse party's expected jury award.<sup>49</sup> Anderson's and Rowe's tentative conclusions should help guide consideration currently given to altering Rule 68.

Professor Susan Olson introduces a different kind of empirical analysis.<sup>50</sup> She is the first to examine the utilization of state equal access to justice acts, under which eligible individuals and businesses can recover fees if they prevail in litigation against the government,

45. The Advisory Committee on Civil Rules twice proposed that Rule 68 be expanded generally to include attorney fees. Both proposals were rejected, in part because of the fear that strengthening Rule 68 would undermine Congress's overall intent to promote fee shifting. See William W. Schwarzer, *Fee Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147 (Oct.-Nov. 1992). Senate Bill No. 554 would include an offer of judgment provision in the Equal Access to Justice Act, see *supra* note 13, and the Attorney Accountability Act of 1995, H.R. 988, 104th Cong., 1st Sess. (1995), would include fees in an offer of judgment provision applicable to federal civil diversity actions.

46. Anderson & Rowe, *supra* note 43, at 524.

47. See, e.g., Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93 (1986) (noting that principal impact of including fees in offer of judgment scheme would be to redistribute wealth from plaintiffs to defendants).

48. Anderson & Rowe, *supra* note 43, at 529-31. As Anderson & Rowe note, there may well be other reasons that offers of judgment facilitate settlement. *Id.* at 532-37; see also Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act—A Qualified Success*, 11 YALE L. & POL'Y REV. 458, 502-04 (1993).

49. Anderson & Rowe, *supra* note 43, at 537-39.

50. Olson, *supra* note 9.

whether as a defendant or plaintiff. Unlike the conventional one-way fee-shifting statutes that shift fees to encourage suit in particular substantive areas, equal access to justice statutes are unique in authorizing fee shifting across a wide range of cases. In contrast, therefore, to most one-way fee-shifting statutes that encourage private parties to sue, the wisdom of equal access to justice acts turns at least in part on the need to equalize the litigating strength between governments and private parties of modest means. As Olson suggests, a deregulatory philosophy animated passage of equal access to justice acts, helping small businesses escape from oppressive or arbitrary government regulation.

After examining all state fee-shifting statutes she could unearth, Olson reports that at least thirty states have now adopted some form of an equal access to justice act.<sup>51</sup> The data collected by Olson are sketchy, but nonetheless bolster her conclusion that, in contrast to claims under the federal Equal Access to Justice Act, small businesses principally have utilized such statutes at the state level.<sup>52</sup> Moreover, she adds that litigation under the equal access to justice acts primarily encompasses nonmonetary or modest financial stakes, the category of cases for which the extra inducement to sue is presumably most needed.<sup>53</sup>

The theoretical contributions of Hylton, Talley, and Hay, and the empirical work of Anderson, Rowe, and Olson should help policy-makers shape fee-shifting policy, whether in terms of incentives to file suit or conclude settlement. The final three contributors to the Symposium have fashioned innovative policy suggestions of their own.

Professor Pamela Karlan calls for more direct fee shifting in criminal cases.<sup>54</sup> Karlan notes that the vast majority of criminal litigation resembles one-way fee shifting today in light of court-appointed counsel, except that the fees are shifted irrespective of the verdict. She posits that, much as in the civil context, the result at trial can be affected by the amount of the defendant's investment, as the O.J. Simpson case amply demonstrates.<sup>55</sup> Karlan opposes shifting fees in all cases of acquittal when counsel has been retained because an acquittal does not necessarily reflect any wrongdoing on the part of the prosecution. Many factors, such as jury nullification or newly developed

51. *Id.* at 554-56.

52. *Id.* at 572-73.

53. *Id.* at 572-76.

54. Pamela S. Karlan, *Fee Shifting in Criminal Cases*, 71 CHI.-KENT L. REV. 583 (1995).

55. *Id.* at 584-89.

evidence, may influence the ultimate verdict even when the prosecution has clearly satisfied the probable cause standard needed to initiate suit.<sup>56</sup>

Nonetheless, Karlan suggests that fees for retained counsel should be shifted to the government in more unusual contexts. She concludes that defendants whose cases should never have been brought and defendants whose costs have been inflated by the government's wrongful conduct should be entitled to recoup the costs of their defense.<sup>57</sup> For instance, fees should be shifted, as in the civil rights context, when a defendant successfully challenges the constitutionality of a statute.<sup>58</sup> Similarly, in selective prosecution challenges, which are few and far between, fees should be awarded because the prosecution should never have been initiated.<sup>59</sup> In such contexts, criminal defendants vindicate the public interest in mounting a vigorous challenge to the prosecution, serving a role analogous to that of a private attorney general. Accordingly, one-way fee shifting, as under the Civil Rights Act,<sup>60</sup> is appropriate. Given the leadership of the 104th Congress, however, we are unlikely to see her proposals enacted anytime soon.

Mark Stein has proposed combining the loser-pays rule with a rule shifting some of the risk of not prevailing in tort cases from client to attorney.<sup>61</sup> The contingency fee model, in other words, could be altered to include the prospect that plaintiff's counsel would ultimately be responsible for (at least part of) defendant's fees.<sup>62</sup> One benefit of this arrangement would be to instill greater mutuality in the loser-pays rule, for judgment-proof plaintiffs currently do not need to fear the adverse consequences from a two-way fee shift.<sup>63</sup> With risk shifting, counsel could only accept cases from such clients if they were willing to assume some liability for defeat. In addition, plaintiffs of modest means might be more willing to sue under the loser-pays rule because their counsel would be sharing some of the risk of a defeat. Depending in part on the compensation scheme selected by plaintiff and attorney, however, the plaintiff of modest means would still have

56. *Id.* at 599-602.

57. *Id.* at 589-95.

58. *Id.* at 591-92.

59. *Id.* at 593.

60. 42 U.S.C. § 1988.

61. Mark S. Stein, *The English Rule with Client-to-Lawyer Risk Shifting: A Speculative Appraisal*, 71 CHI.-KENT L. REV. 603 (1995).

62. *Id.* at 607-08.

63. *Id.* at 608-09.

less incentive to sue under the risk-sharing loser-pays system than under the American rule.<sup>64</sup> Although Stein notes the conflict of interest problems between plaintiff and counsel that may arise under a risk-sharing scheme,<sup>65</sup> he concludes that the scheme could nonetheless more sensibly deter frivolous litigation, without deterring as many valid claims, in comparison to the English rule by itself.<sup>66</sup>

Professor Richard Painter picks up the same theme of risk sharing and takes it one step further.<sup>67</sup> Instead of exploring risk-sharing alternatives between plaintiff and attorney, he analyzes the potential for a wider market in risk sharing. Painter suggests not only a market for sharing the risk of attorney-fee shifts, but also for the contingency fee itself. Litigation insurers could offer to pay a plaintiff's legal fees in advance, including potential liability for fees under the English rule, in exchange for a sum to be paid out of any judgment or settlement obtained.<sup>68</sup> Indeed, Painter notes that at least one finance group has already entered the market to finance appeals.<sup>69</sup>

Despite the common law and statutory prohibitions on champerty, Painter suggests several reasons for why a legalized market would be beneficial. An insurance market might minimize the perverse incentives currently affecting attorneys arising from the contingency fee system.<sup>70</sup> For instance, when attorneys are the risk sharers, they may have too great an incentive to engage in unethical practices to ensure victory, and there may be too great an incentive as well to conclude settlements even when settlement is not in the client's best interest. Moreover, because some attorneys are poor diversifiers of risk, the attorneys available on a contingency (or other risk-sharing arrangement) may not provide optimal service in light of uneven cash flows.<sup>71</sup> And, attorneys acting on a contingency basis may overcharge merely because they cannot diversify risk as well as a third-party insurer. Although sharing the risk with lawyers instead of third parties might lower information costs due to the attorney's familiarity with the case, overall Painter suggests that the benefits of the option of third-party insurance outweigh the disadvantages.<sup>72</sup> He would allow

64. *Id.* at 615-18.

65. *Id.* at 619-20.

66. *Id.* at 611-18.

67. Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625 (1995).

68. *Id.* at 652-55.

69. *Id.* at 633 & n.36.

70. *Id.* at 668-74.

71. *Id.* at 678-81.

72. *Id.* at 682-85.

the market to sort out appropriate financing arrangements at the expense of vestigial champerty restrictions and Model Rules of Professional Conduct that prohibit attorney financing of lawsuits.<sup>73</sup>

In sum, this Symposium contributes to our understanding of fee shifting on theoretical, empirical, and policy grounds. Study of these papers can only make more sophisticated ultimate evaluation of the many fee-shifting schemes recently proposed as well as those that will be crafted in the future.

73. *Id.* at 687-89.